STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 21, 2011
v	No. 296795 Monroe Circuit Court
DONNY ROY BARTEL, Defendant-Appellant.	LC No. 09-037693-FH

Before: FORT HOOD, P.J., and DONOFRIO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for operating a motor vehicle with a suspended license causing serious injury, MCL 257.904(5), and leaving the scene of an accident causing serious injury or death, MCL 257.617(2).[1] The trial court sentenced defendant to 24 to 60 months' imprisonment for the operating a motor vehicle with a suspended license causing serious injury conviction and 24 to 60 months' imprisonment for the leaving the scene of an accident causing serious injury or death conviction. Because sufficient evidence supported defendant's convictions, the prosecutor did not commit misconduct, the trial court did not abuse its discretion in allowing certain lay opinion testimony, and the trial court correctly scored defendant's PRVs and OVs at sentencing, we affirm.

[1] Defendant was charged on two separate felony informations and had two separate jury verdict forms. The first felony information was for case number 09-037498, and the charge was driving while impaired causing serious injury, MCL 257.625(5). The second felony information was for case number 09-037693-FH, and the three charges were operating a motor vehicle with a suspended license causing serious injury or death, MCL 257.904(5), leaving the scene of an accident causing serious injury or death, MCL 257.617(2), and negligent operation of a motor vehicle causing a miscarriage, MCL 750.90e. These cases were tried together and the jury found defendant not guilty of driving while impaired causing serious injury from case number 09-037498 and negligent operation of a motor vehicle causing a miscarriage from case number 09-037693-FH.

Defendant first argues that there is insufficient evidence to uphold his convictions. When reviewing a claim of insufficient evidence, we review the record de novo in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009). In reviewing the sufficiency of the evidence, we "must not interfere with the jury's role as the sole judge of the facts." *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005). Also, we review issues of statutory interpretation de novo on appeal. *People v Lowe*, 484 Mich 718, 720; 773 NW2d 1 (2009).

The elements of leaving the scene of an accident causing serious impairment or death are that the driver of a vehicle who knows or who has reason to believe that he was involved in an accident resulting in serious impairment or death failed to stop at the accident scene. MCL 257.617; *People v Goodin*, 257 Mich App 425, 429; 668 NW2d 392 (2003). Because direct evidence of knowledge is rarely available, a defendant's knowledge may be inferred from circumstantial evidence. *People v Salata*, 79 Mich App 415, 421; 262 NW2d 844 (1977). Thus, "[c]ircumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime." *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). Furthermore, "[a]ll conflicts with regard to the evidence must be resolved in favor of the prosecution" because the jury determines the credibility of the witnesses and the weight accorded to evidence. *Id*.; see also *People v McGhee*, 268 Mich App 600, 624; 709 NW2d 595 (2005).

In reviewing the record in the light most favorable to the prosecution, a rational trier of fact could find that there was sufficient evidence to prove beyond a reasonable doubt that defendant knew or had reason to believe that he was involved in an accident. Crystal Shamma testified that she was walking behind the victim, Elizabeth Hughes, on the gravel shoulder when three vehicles drove past them. The first two vehicles swerved into the other lane, but the third vehicle struck the victim. Shamma testified that when the third vehicle struck the victim, Shamma heard the sound of something breaking before she heard the vehicle's tires squeal and skid. Thereafter, the vehicle accelerated and drove off while Shamma was screaming for help. Joseph Russell testified that he suddenly heard a very loud, metallic sounding crash, while Robert Walker and James Hughes testified that they suddenly heard tires screeching. All three men also heard Shamma screaming for help immediately after hearing the accident. Defendant admitted that he felt a bump from his vehicle making contact with something while he was driving on North Stoney Creek Road. The prosecution offered sufficient evidence for the jury to conclude that defendant knew or had reason to believe that he was involved in an accident.

Additionally, defendant contends that he did not know or have reason to believe that he was involved in an accident that resulted in the serious injury or death of a person. However, in looking at the evidence in the light most favorable to the prosecution, the evidence was sufficient to prove that defendant's vehicle struck a person. Deputy Brian Quinn, Deputy Charles Myers, and Deputy Kevin Mercure all testified that the human hair and tissue on defendant's vehicle were visible to the naked eye. Furthermore, when Myers and Mercure processed defendant's vehicle, they found the victim's hair underneath the vehicle's antenna and underneath the duct tape defendant had placed over his vehicle's front, right headlight. They found the victim's flesh underneath the vehicle's passenger side front hood and on top of the vehicle's passenger side front hood, passenger side front windshield, and passenger side mirror. They also found the victim's bodily fluids on the vehicle's front passenger side door. "It is for the trier of fact, not

the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). The prosecution offered sufficient evidence for the jury to find that defendant knew or had reason to believe that he struck a person.

Defendant also contends that because the prosecution failed to prove that defendant's driver's license was not suspended pursuant to MCL 257.321a, there was insufficient evidence for the jury to convict defendant of driving with a suspended license causing serious injury. The prosecutor responds that, while defendant is correct that under MCL 257.904(5) a conviction cannot be based on a violation of MCL 257.321a, but defendant's license was not suspended pursuant to MCL 257.321a, it was suspended for failing to pay a driver responsibility fee pursuant to MCL 257.732a. In interpreting a statute this Court must discern and give effect to legislative intent. *People v Zujko*, 282 Mich App 520, 522; 765 NW2d 897 (2008). If the language of the statute is clear and unambiguous, this Court presumes that the Legislature intended that meaning and the statute is enforced as written. *Id*. "Under such circumstances, judicial construction is neither required nor permitted." *Id*.

Defendant was convicted of driving with a suspended license causing serious injury pursuant to MCL 257.904(5). MCL 257.904(5) provides:

> A person who operates a motor vehicle [with a suspended or revoked license] and who, by operation of that motor vehicle, causes the serious impairment of a body function of another person is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not less than $1,000.00 or more than $5,000.00, or both. This subsection does not apply to a person whose operator's or chauffeur's license was suspended because that person failed to answer a citation or comply with an order or judgment pursuant to [MCL 257.321a].

MCL 257.321a(2) provides:

> (2) Except as provided in subsection (3), 28 days or more after a person fails to answer a citation, or a notice to appear in court for a violation reportable to the secretary of state under [MCL 257.732] . . . or for any matter pending, or fails to comply with an order or judgment of the court, including, but not limited to, paying all fines, costs, fees, and assessments, the court shall give notice by mail at the last known address of the person that if the person fails to appear or fails to comply with the order or judgment within 14 days after the notice is issued, the secretary of state shall suspend the person's operator's or chauffeur's license. If the person fails to appear or fails to comply with the order or judgment within the 14-day period, the court shall, within 14 days, inform the secretary of state, who shall immediately suspend the license of the person. The secretary of state shall immediately notify the person of the suspension by regular mail at the person's last known address.

MCL 257.732 provides, in pertinent part:

(1) Each municipal judge and each clerk of a court of record shall keep a full record of every case in which a person is charged with or cited for a violation of this act or a local ordinance substantially corresponding to this act regulating the operation of vehicles on highways and with those offenses pertaining to the operation of ORVs or snowmobiles for which points are assessed under section 320a(1)(c) or (i). Except as provided in subsection (16), the municipal judge or clerk of the court of record shall prepare and forward to the secretary of state an abstract of the court record as follows:

* * *

(4) The clerk of the court also shall forward an abstract of the court record to the secretary of state upon a person's conviction involving any of the following:

* * *

(*l*) A violation of [MCL 500.3101, 500.3102(1), and 500.3103 failure to show proof of insurance].

However, the prosecution asserts that defendant's driver's license was actually suspended under MCL 257.732a.

MCL 257.732a provides, in part:

(2) An individual, whether licensed or not, who violates any of the following sections or another law or local ordinance that substantially corresponds to those sections shall be assessed a driver responsibility fee as follows:

* * *

(d) Upon posting an abstract indicating that an individual has been found guilty or determined responsible for a violation listed in [MCL 257.328], the secretary of state shall assess a $200.00 driver responsibility fee each year for 2 consecutive years.

* * *

(5) Except as otherwise provided under this subsection, if payment is not received or an installment plan is not established after the time limit required by the second notice prescribed under subsection (3) expires, the secretary of state shall suspend the driving privileges until the assessment and any other fees prescribed under this act are paid . . . .

Finally, MCL 257.328(1) provides:

(1) The owner of a motor vehicle who operates or permits the operation of the motor vehicle upon the highways of this state or the operator of the motor vehicle shall produce . . . upon the request of a police officer, evidence that the motor

> vehicle is insured under chapter 31 of the insurance code of 1956 . . . . Subject to section 907(16), an owner or operator of a motor vehicle who fails to produce evidence of insurance under this subsection when requested to produce that evidence or who fails to have motor vehicle insurance for the vehicle as required under chapter 31 of the insurance code of 1956 . . . is responsible for a civil infraction.

A plain reading of the applicable statutes reveals that, pursuant to MCL 257.328(1), if a person is convicted of a civil infraction for failing to produce proof of insurance, the civil infraction is reportable to the secretary of state pursuant to MCL 257.732. If a person fails to answer the citation or comply with an order or judgment of the court, then his or her driver's license is suspended pursuant to MCL 257.321a. However, once a person is guilty of a MCL 257.328(1) violation, the secretary of state is required to assess a driver responsibility fee pursuant to MCL 257.732a(2)(d). If the person fails to pay the driver responsibility fee, the secretary of state must suspend the person's driver's license until payment of the driver responsibility fee is rendered pursuant to MCL 257.732a(5).

In looking at the evidence in the light most favorable to the prosecution, a rational trier of fact could find that there was sufficient evidence to prove beyond a reasonable doubt that defendant's license was suspended pursuant to MCL 257.732a. Defendant's certified driver's record reveals that defendant was convicted of a MCL 257.328(1) civil infraction on November 30, 2007, for failing to show proof of insurance as required by MCL 500.3101 and MCL 500.3102. This civil infraction was reportable to the secretary of state under MCL 257.732(4)(*l*), and if defendant had failed to answer that citation or comply with an order or judgment of the court, his driver's license would have been suspended pursuant to MCL 257.321a(2). But, because defendant was convicted of a MCL 257.328(1) civil infraction for no proof of insurance, pursuant to MCL 257.732a(2)(d), on December 6, 2007, the secretary of state assessed defendant a mandatory driver responsibility fee. Thereafter, on April 16, 2008, defendant's driver's license was suspended indefinitely pursuant to MCL 257.732a(5) until defendant paid the driver responsibility fee. Thus, because defendant's driving privileges were suspended for failing to pay the driver responsibility fee pursuant to MCL 257.732a, and not because defendant failed to answer the citation or follow a court order or judgment under MCL 257.321a, there is sufficient evidence to uphold his conviction for operating a motor vehicle with a suspended license causing serious injury.

Defendant next argues that the prosecutor committed misconduct when he made an improper comment and failed to produce evidence. Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting the defendant's substantial rights. To avoid forfeiture of the issue under plain error, the defendant must show that: (1) an error occurred, (2) the error was plain, meaning clear or obvious, and (3) the plain error affected the defendant's substantial rights. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003), citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To show plain error affecting the defendant's substantial rights, the defendant must prove prejudice occurred, meaning that the error must have affected the outcome of the lower court proceedings. *Id*.

A prosecutor may not engage in conduct or make an argument that rises to the level of denying defendant a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d

546 (2007). Prosecutorial misconduct claims are reviewed "on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of [the] defendant's arguments." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Prosecutors are generally given great latitude regarding their arguments and conduct. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), citing *People v Duncan*, 402 Mich 1, 16-18; 260 NW2d 58 (1977). The thrust of a prosecutorial misconduct analysis is to determine whether defendant was denied a fair trial. *People v Wilson*, 265 Mich App 386, 393; 695 NW2d 351 (2005).

Specifically, defendant asserts that misconduct occurred when the prosecutor stated that defendant left the victim to die because, before giving that statement, the prosecutor made repeated references to human tissue on defendant's vehicle and the roadway. After reviewing the record and considering the prosecutor's comment in context, we conclude that defendant was not denied a fair trial. The prosecutor's comment was in response to defendant's testimony that he did not know that he had hit a human being. The prosecutor sought to test the credibility of defendant's claim because several deputies testified that the human hair and tissue were visible to the naked eye on defendant's vehicle. See *People v Fields*, 450 Mich 94, 112-113; 538 NW2d 356 (1995) (a prosecutor may comment on the weakness of the defendant's theory).

Next, defendant asserts that the prosecutor committed misconduct when he stated that he was going to offer proof that defendant denied smoking marijuana after the accident, however, the prosecutor failed to do so. But the record is clear that the prosecutor did not state that he was going to produce evidence that defendant lied about smoking marijuana after the hit and run accident. Rather, the prosecutor merely posed a proper hypothetical question to a qualified expert regarding defendant's theory of the case. See *People v Dobben*, 440 Mich 679, 695-696; 488 NW2d 726 (1992) (an expert may render an opinion based on observation, a hypothetical question, hearsay information, the testimony of other witnesses, or the findings and opinions of other experts).

Furthermore, a curative instruction generally eliminates any possible prejudicial effect that may have resulted from prosecutorial misconduct. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). The trial court properly instructed the jury that defendant was innocent until proven guilty, the prosecution bears the burden of proving each element of each charged crime beyond a reasonable doubt, the fact that defendant was charged with a crime was not evidence, and the attorneys' statements and arguments were not evidence. Thus, any potential prejudice arising from the prosecution's alleged misconduct was dispelled. See *Bahoda*, 448 Mich at 281 (comments made by the prosecution during closing arguments were not improper when read in their entirety and the trial court's instructions to the jury, that the attorney's arguments were not evidence, dispelled any prejudice). In sum, after reviewing the record and evaluating the prosecutor's remarks in context, we conclude that defendant cannot show plain error affecting his substantial rights.

Defendant also asserts that the trial court erred when it allowed an unqualified expert to provide expert testimony at trial. Preserved evidentiary issues are reviewed for an abuse of discretion. *People v Orr*, 275 Mich App 587, 588; 739 NW2d 385 (2007). An abuse of discretion exists if the results are outside the principled range of outcomes. *Id*. at 588-589.

MRE 701 provides:

> [i]f the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Thus, pursuant to MRE 701, the trial court may permit a lay witness to give an opinion that is based on the witness's rational perception, if the lay opinion would be helpful in understanding the witness's testimony or in determining an issue of fact. *McLaughlin*, 258 Mich App at 657. The trial court allowed Quinn to testify regarding his lay opinion of where the victim made contact with defendant's vehicle based on Quinn's personal observations of the dents, human hair, and human tissue that Quinn observed on defendant's vehicle the day after the accident. The trial court did not qualify Quinn as an expert in accident reconstruction because it found that Quinn's observations and opinions were rationally based on his own perceptions regarding the condition of defendant's vehicle post-accident. Our review of the record reveals that, indeed, Quinn's observations and opinions were rationally based on his own perceptions of both the physical condition of defendant's vehicle post-accident and his observation of human tissue on the vehicle. Quinn's personal observations combined with the other witnesses' detailed testimony concerning the condition of defendant's vehicle, and that it was the victim's body tissue, hair, and bodily fluids attached to defendant's vehicle renders any lay opinion by Quinn concerning the victim's actual impact with the motor vehicle harmless. Furthermore, Quinn's observations and opinions were helpful to the jury because defendant maintained that he was unaware that he was involved in an accident. Thus, the trial court did not permit unqualified expert testimony into evidence. The trial court did not err when it admitted Quinn's lay opinion testimony into evidence.

Defendant argues that the trial court improperly scored PRV 7, OV 4, OV 9, OV 13, OV 17, OV 18, and OV 19. This Court reviews de novo the application of the sentencing guidelines, but reviews a trial court's scoring of a sentencing variable for an abuse of discretion. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008); *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A sentencing court has discretion in determining the number of points to be scored, provided the evidence adequately supports a particular score. *Hornsby*, 251 Mich App at 468. "Scoring decisions for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). This Court must affirm a sentence within the applicable guidelines range, absent an error in the scoring or reliance on inaccurate information in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004).

Under MCL 777.57(1)(b) (PRV 7), ten points are scored if the defendant has one subsequent or concurrent felony conviction. Contrary to defendant's argument, because there was sufficient evidence to uphold defendant's convictions, as we concluded above, the trial court properly scored ten points under PRV 7.

Under MCL 777.34(1)(a) (OV 4), ten points are scored if "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(2) states to "[s]core 10 points if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive." The victim's expression of fearfulness is enough to satisfy the statute. *People v Davenport (After Remand)*,

286 Mich App 191, 200; 779 NW2d 257 (2009). The presentence investigation report reflects that the victim checked "yes" on the victim impact statement when she answered whether the crime resulted in serious psychological injury. There was also evidence that the victim fell into a deep depression and suffered from mental health problems requiring medication as a result of the accident. Furthermore, the victim stated at the sentencing hearing that she had nightmares because of the accident and she had lost time with both her ten month old son and her unborn child. This evidence is sufficient to uphold the trial court's scoring of OV 4 at ten points.

Under MCL 777.39(1)(c) (OV 9), ten points are scored if "[t]here were 2 to 9 victims who were placed in danger of physical injury or death, or 4 to 19 victims who were placed in danger of property loss." MCL 777.39(2)(a) states to "[c]ount each person who was placed in danger of physical injury or loss of life or property as a victim." Shamma was present when defendant's vehicle struck the victim, and Shamma testified that she had to jump back to avoid being hit by defendant's vehicle. This evidence is sufficient to uphold the trial court's scoring of OV 9 at ten points.

Under MCL 777.43(1)(c) (OV 13), 25 points are scored if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(2)(a) provides that all offenses committed within a five year period "shall be counted regardless of whether the offense resulted in a conviction." Contemporaneous crimes are included in the five year period for purposes of scoring OV 13. See *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001). For purposes of sentencing, an offense may be established by a preponderance of the evidence. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). "'Preponderance of the evidence' means such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth." *People v Cross*, 281 Mich App 737, 740; 760 NW2d 314 (2008). "A sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial." *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993), remanded 447 Mich 984 (1994).

In scoring OV 13, the trial court determined that the preponderance of the evidence proved the charge that defendant was driving while impaired causing serious injury because marijuana was found in defendant's system even though he denied using any after the accident, defendant admitted that he smoked marijuana before the accident, and defendant was untruthful with the police during his initial interview in the parking lot and during part of his interview at the police station. The trial court also credited the testimony of the Michigan State Police toxicology expert who testified that "there was a showing of marijuana in [defendant's] system," although there was no way to determine the level of marijuana present at the time of the accident. While the jury acquitted defendant of the charge of driving while impaired causing serious injury, MCL 257.625(5), nevertheless there was objective evidence on the record that defendant had used marijuana before the accident that could support the lesser preponderance of the evidence standard applicable during sentencing. And, "[s]coring decisions for which there is any evidence in support will be upheld." *Elliott*, 215 Mich at 260. The record evidence is sufficient to uphold the trial court's scoring of OV 13 at 25 points.

Under MCL 777.47(1)(b) (OV 17), five points are scored if "[t]he offender failed to show the degree of care that a person of ordinary prudence in a similar situation would have shown." The evidence revealed that the two vehicles in front of defendant successfully swerved to avoid hitting the victim and Shamma, while defendant did not. Defendant also admitted that he felt a bump from something while he was driving but he did not stop and investigate whether he was involved in an accident. As the trial court pointed out at sentencing, defendant certainly knew that he had hit something because he indicated that he might have hit a mailbox, a dog, a deer, and in fact presented "all sorts of different scenarios." This evidence is sufficient to uphold the trial court's scoring of OV 17 at five points.

Under MCL 777.48(1)(c) (OV 18), ten points are scored if "[t]he offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive while the offender was under the influence of alcoholic or intoxicating liquor, a controlled substance, or a combination of alcoholic or intoxicating liquor and a controlled substance . . . ." Similar to its reasoning under OV 13, the trial court found that the preponderance of evidence established that defendant was under the influence of marijuana because marijuana was found in defendant's system even though he denied using any after the accident, defendant admitted that he smoked marijuana before the accident, and defendant was untruthful to the police. The trial court specifically found that based on the record evidence, including the expert testimony, witness statements, and defendant's statements to police that, "it does appear that [defendant] had consumed or used marijuana" in a pertinent time period before the accident. The trial court pointed out that it was making this finding under the preponderance of the evidence standard. This was the proper standard, there is evidence on the record to support the trial court's finding, *Elliott*, 215 Mich at 260, and therefore we conclude that the evidence is sufficient to uphold the trial court's scoring of OV 18 at ten points.

Under MCL 777.49(c) (OV 19), ten points are scored if "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." In *People v McGraw*, 484 Mich 120, 122; 771 NW2d 655 (2009), the Michigan Supreme Court held that, "a defendant's conduct after an offense is completed does not relate back to the sentencing offense for purposes of scoring offense variables unless a variable specifically instructs otherwise." However, the Michigan Supreme Court has clarified that *McGraw* does not apply to OV 19:

> Because the circumstances described in OV 19 expressly include events occurring after a felony has been completed, the offense variable provides for the 'consideration of conduct after completion of the sentencing offense.' Under the exception to the general rule set forth by this Court in *McGraw*, OV 19 may be scored for conduct that occurred after the sentencing offense was completed. [*People v Smith*, 488 Mich 193, 202; 793 NW2d 666 (2010), quoting *McGraw*, 484 Mich at 133-134.]

The evidence reveals that defendant lied to the police at least three times before he finally confessed that he was involved in the accident. Because lying to the police is considered an interference with the administration of justice, *People v Barbee*, 470 Mich 283, 286-288; 681 NW2d 348 (2004), the trial court properly scored OV 19 at ten points.

Because no error occurred in the scoring of defendant's sentencing variables, his minimum sentencing guidelines range has not changed, and he is not entitled to resentencing. See *People v Francisco*, 474 Mich 82, 88-92; 711 NW2d 44 (2006).

Affirmed.

/s/ Karen M. Fort Hood
/s/ Pat M. Donofrio
/s/ Amy Ronayne Krause